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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID CERRITOS, Defendant and Appellant.	B244940 (Los Angeles County Super. Ct. No. YA079552)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Modified in part, affirmed in part, with directions.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, David Cerritos, of cocaine possession in violation of Health and Safety Code section 11350, subdivision (a). The trial court found true a prior serious or violent felony conviction allegation within the meaning of Penal Code sections 667, subdivisions (b) through (i), and 1170.12.[1] Defendant was sentenced to three years in state prison for cocaine possession. His sentence was doubled to six years under sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1).

On appeal, defendant argues there was insufficient evidence his prior Nevada aggravated battery conviction was a serious felony within the meaning of sections 667, subdivisions (b) through (i), and 1170.12. Implied in defendant's argument is that the Nevada prior conviction is not a violent felony within the meaning of section 667.5, subdivision (c). We conclude defendant's nonspecific generalized hearsay objection to the entirety of the prosecution evidence concerning the Nevada conviction forfeits the evidentiary contentions he asserts on appeal. Thus, we find the evidence was sufficient to sustain the prior serious or violent felony conviction allegation. In addition, we modify defendant's presentence custody and conduct credits. We direct the trial court upon remittitur issuance to amend the abstract of judgment. We affirm the judgment in all other respects.

II. THE WAIVER OF THE RIGHT COUNSEL AND THE COURT TRIAL OF THE PRIOR CONVICTION

A. Waiver Of The Right To Counsel

On August 9, 2011, defendant's substitution of counsel motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 122-126, was denied. (See *People v. Maciel* (2013) 57

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[1] Further statutory references are to the Penal Code except where otherwise noted.

Cal.4th 482, 513.) Defendant then for the first time indicated that he wished to represent himself. The trial court stated it would give defendant an opportunity to consider his desire to appear pro se: "Well, I'm disinclined to grant a *Faretta* motion at this point, particularly after just addressing the *Marsden* issue, because I don't want you to make a bad decision worse by asking to go pro per after your *Marsden* motion is denied. [¶] But my inclination is to defer that until your next court appearance . . . ."

Defendant was provided with a form for waiving the right to counsel and the following ensued: "Then what I'll do is direct the clerk to provide [defendant] with a *Faretta* waiver form so he can review that form. [¶] [L]et me tell you at the outset I really discourage you from representing yourself. I've been in this business . . . in one fashion or another since 1978." The trial court then reiterated in various ways its arguments as to why defendant should not represent himself. The trial court concluded: "We'll give you the forms. [¶] I want you to think about it. [¶] Think about my comments on whether it's in your best interests to represent yourself. [¶] I'm going to order you back on Friday. You may [request] on Friday to represent yourself. And [if] you're able to go to trial in a reasonable period of time, I'll grant your request. But I really think it's not in your best interests."

On August 12, 2011, defendant, who was in custody, returned and the trial court reiterated: "I indicated to [defendant] that I did not want to take his *Faretta* waiver form on that date, particularly after the *Marsden* motion, because I wanted [to] to give him the opportunity to think through his options. [¶] I also wanted him to be able to review the *Faretta* waiver forms so that he had a better understanding of his rights, as well as potential pitfalls in representing himself." Defendant explicitly stated that he wished to represent himself and had filled out the waiver form provided earlier on August 9, 2011, by the trial court. After defendant acknowledged that he had read and understood the waiver of rights form, the following occurred: "[Y]ou do understand that it's always unwise to represent yourself, that you may conduct your defense to your own detriment? [¶] Do you understand, sir? [¶] The defendant: Yes, sir. [¶] The court: Do you understand that you'll have to follow the same rules that govern attorneys? Including

technical rules of substantive law, criminal procedure and evidence in the making of motions and objections, the presentation of evidence . . . ?" [¶] The defendant: Yes, sir." After a further advisement of the consequences of self representation, the following occurred: "The court: Do you understand that you automatically lose a right to appeal based on ineffective assistance of counsel when you're representing yourself? [¶] The defendant: Yes, sir. [¶] The court: Do you understand that if you're represented by an attorney and the attorney performs ineffectively, that you'd be entitled to have any conviction reversed based upon that ground; but because you are . . . acting as your own attorney, that you forfeit that? [¶] Do you understand? [¶] The defendant: Yes, sir." Thereafter, the trial court found, "I find that the waiver of right to counsel is knowingly, intelligently and voluntarily made." No issue has been raised on appeal concerning the validity of defendant's waiver of the right to counsel.

B. Court Trial

Defendant's Nevada conviction was for battery causing substantial bodily harm. Under Nevada law, a "battery" is, "[A]ny willful and unlawful use of force or violence upon the person of another." (Nev. Rev. Stat. § 200.481; see *Jackson v. State* (Nev. 2012) 291 P.3d 1274, 1276.) A battery resulting in "substantial bodily harm to the victim" is a felony. (Nev. Rev. Stat., § 200.481, subd. 2(b); see *Allred v. State* (Nev. 2004) 92 P.3d 1246, 1253, fn. 18.) "Substantial bodily harm" means: "1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or [¶] 2. Prolonged physical pain." (Nev. Rev. Stat., § 0.060; see *Collins v. State* (Nev. 2009) 203 P.3d 90, 92-93.)

The trial court bifurcated the trial of the prior serious or violent felony conviction allegation. Defendant subsequently waived any right to have the jury determine the truth of that allegation. At the court trial, Deputy District Attorney Erika Jerez offered five exhibits in support of the prior Nevada conviction allegation. Exhibit No. 20 is a nine-

page certified California Law Enforcement Telecommunications document. Much of the document is single spaced. Page five of that document reflects that on April 23, 2008, in Nevada case number CR05-2067, defendant pled guilty and was convicted of battery with substantial bodily harm, a felony violation of Nevada Revised Statutes section 200.481. A charge of attempted murder with a deadly weapon causing substantial bodily harm (Nev. Rev. Stat. § 200.0301) was dismissed. Exhibit No. 21 is a certified copy of the two and one-half page second amended information in the Nevada case. Defendant was named as the sole defendant. Count III alleged battery causing substantial bodily harm, a violation of Nevada Revised Statutes section 200.481, "[T]he said defendant on the 7th day of August A.D., 2007, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully and unlawfully use force and violence upon the person of LUCILLE MCGOWAN by striking and/or stabbing said victim at 406 Linden Street, Reno, Washoe County, Nevada, such force and violence causing substantial bodily harm to the said LUCILLE MCGOWAN." Exhibit No. 22 is a certified copy of the two-page April 23, 2008 judgment in the Nevada case. The judgment recites, "That David Cerritos is guilty of the crime of Battery Causing Substantial Bodily Harm, a violation of [Nevada Revised Statutes section] 200.481, a felony, as charged in Count III of the Second Amended Information . . . ." Exhibit No. 23A is a certified August 7, 2005 booking photograph of David Cerritos.

Exhibit No. 24 is a certified 53-page reporter's transcript of the sentencing hearing in the Nevada case. Defense counsel, Mike Roth, admitted that defendant had been violent. Mr. Roth explained the difficulties resulting from defendant's felony battery conviction: "We had him evaluated by Steve Charter, and Mr. Charter recommended a long-term program, said that he would benefit by it. And he recommended either the Gospel Mission as an in-house program or the Salvation Army Program. [¶] And there are some stumbling blocks into getting into those programs, as you're probably aware of. Some of the programs don't like to have people who have had some kind of violence on the record get into the programs because obviously there's a risk to other participants in the program, and then there may be some liability to the program as well." The

prosecutor, Washoe County Deputy District Attorney Elliott Sattler, argued against defendant being placed on probation. Mr. Sattler stated: "I can't see how you can recommend probation for somebody who committed a crime of violence. It was a horrible crime. As the Court may recall, [defendant] was initially charged with attempted murder for stabbing Miss McGowan, but eventually pled to battery causing substantial bodily harm." The victim, Lucille McGowan, told the Nevada court she was acquainted with defendant and recognized him at the time of the attack. Ms. McGowan said defendant placed a pillow over her face and stabbed her in the neck. Defendant cut her wind pipe and barely missed her main artery. Ninety-six stitches were necessary to close the wound. Ms. McGowan had a permanent scar as a result.

As noted, defendant represented himself at the court trial in the present case. Defendant objected to all of the prosecution's evidence on hearsay grounds: "The Defendant: Excuse me, your Honor. [¶] Would I be able to object to this on hearsay? [¶] The Court: Sure, you can make your objection. [¶] So is that your objection? [¶] The Defendant: Yes, sir. [¶] The Court: Do you wish to be heard with regards to any specific exhibit or just as to all of them? [¶] The Defendant: As to all of them." The trial court overruled the objection except as to correspondence that accompanied the booking photograph in exhibit No. 23. The trial court found beyond a reasonable doubt that defendant was convicted in Nevada of battery causing serious bodily injury. The trial court further found the conviction qualified as a prior offense within the meaning of sections 667, subdivisions (b) through (i), and 1170.12. Defendant does not challenge the trial court's hearsay ruling on appeal.

III. DISCUSSION

A. The Prior Conviction Finding

Defendant challenges the sufficiency of the evidence to support the trial court's finding the Nevada offense qualified as a prior serious or violent felony conviction under

sections 667, subdivisions (b) through (i), and 1170.12. Sections 667, subdivisions (b) through (i), and 1170.12 mandate greater punishment for a defendant with a prior serious or violent felony conviction. Pursuant to section 667, subdivision (d)(2), "A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (Accord, § 1170.12, subd. (b)(2); see *People v. Warner* (2006) 39 Cal.4th 548, 552-553; *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.) The prosecution was required to prove each element of the sentence enhancement beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082; *People v. Delgado* (2008) 43 Cal.4th 1059, 1065; *People v. Tenner* (1993) 6 Cal.4th 559, 566.) Our review is for substantial evidence. (*People v. Delgado, supra,* 43 Cal.4th at p. 1067; *People v. Tenner, supra,* 6 Cal.4th at p. 567.) As our Supreme Court explained in *Delgado*: "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. ([*People v.*] *Tenner, supra,* 6 Cal.4th [at p.] 567; [*People v.*] *Jones* [(1999)] 75 Cal.App.4th 616, 631.)" (*People v. Delgado, supra,* 43 Cal.4th at p. 1067.)

Here, the parties agree defendant's Nevada conviction qualifies as a prior serious felony within the meaning of sections 667, subdivisions (b) through (i), and 1170.12 under two circumstances. The first circumstance is if defendant "*personally* used a dangerous or deadly weapon" within the meaning of section 1192.7, subdivision (c)(23). (Italics added.) The second circumstance arises if defendant "*personally* inflict[ed] great bodily injury on any person, other than an accomplice" within the meaning of section 1192.7 subdivision (c)(8). (Italics added.) Further, defendant does not dispute the Nevada victim's injuries qualified as great bodily injury under California law.

(§ 12022.7, subd. (f); *People v. Cross* (2008) 45 Cal.4th 58, 66.) Defendant's arguments are addressed to whether there was substantial evidence he *personally* inflicted injury or *personally* used a knife. Defendant asserts: the Nevada statute criminalizing battery causing serious bodily injury does not require *personal* infliction of the harm; the serious bodily injury element applies to an aider and abetter; it was error for the trial court to rely on the reporter's transcript of the Nevada sentencing hearing to find defendant *personally* inflicted the harm; and the remaining evidence was insufficient because it did not preclude the possibility defendant was convicted of battery causing serious bodily injury as an aider and abettor. (See Nev. Rev. Stat., § 195.020 [a defendant may be guilty as an aider and abettor].)

We turn to the question whether the trial court could properly rely on the unsworn statements made at the Nevada sentencing hearing as evidence defendant personally assaulted Ms. McGowan and inflicted injury on her with a knife. We find such evidence is outside the record of the prior conviction. We further find, however, that defendant failed to object on that ground in trial court. As we will explain, therefore, defendant forfeited that argument and any other arguments. (Evid. Code § 353, subd. (a); *People v. Ledbetter* (2014) 222 Cal.App.4th 896, 900.) Further, as defendant essentially concedes, the unsworn statements at the Nevada sentencing hearing constituted substantial evidence he personally assaulted Ms. McGowan with a knife. Finally, because defendant acted personally, and not as an aider and abetter, his Nevada conviction qualified as a prior offense within the meaning of sections 667, subdivisions (b) through (i), and 1170.12.

To determine the nature of a prior conviction, the trier of fact may look to the entire record of the prior criminal proceeding but no further. (*People v. Trujillo* (2006) 40 Cal.4th 165, 180; *People v. Reed* (1996) 13 Cal.4th 217, 222-223, 226; *People v. Guerrero* (1988) 44 Cal.3d 343, 354-355.) This rule prevents the prosecution from relitigating the circumstances of a crime committed years earlier. (*People v. Trujillo, supra,* 40 Cal.4th at p. 180; *People v. Reed, supra,* 13 Cal.4th at p. 223.) Our Supreme Court has explained, "The reason for this limitation was to 'effectively bar[] the prosecution from relitigating the circumstances of a crime committed years ago and

thereby threatening the defendant with harm akin to double jeopardy and denial of a speedy trial.' [(*People v. Guerrero, supra,* 44 Cal.3d at p. 355)]." (*People v. Trujillo, supra,* 40 Cal.4th at p. 180.) The rule—that a trier of fact may look to the entire record of the prior conviction but no further—applies to prior convictions in other jurisdictions. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082; *People v. Myers* (1993) 5 Cal.4th 1193, 1201.) It is common for the prosecution to prove the facts and nature of the prior conviction by introducing certified documents from the record of that conviction. (*People v. Delgado, supra,* 43 Cal.4th at p. 1066; *People v. Prieto* (2003) 30 Cal.4th 226, 258.) The trier of fact may draw reasonable inferences from such records. (*People v. Delgado, supra,* 43 Cal.4th at p. 1066; *People v. Prieto, supra,* 30 Cal.4th at p. 258.)

Here, as discussed above, the prosecution relied on unsworn statements at defendant's Nevada sentencing hearing to prove he personally assaulted Ms. McGowan and stabbed her with a knife. Defendant argues these post-plea statements are inadmissible to show defendant personally stabbed (used a deadly weapon and inflicted great bodily injury upon) Ms. McGowan. (*People v. Trujillo, supra,* 40 Cal.4th at pp. 175-181; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1127-1128; *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1099-1103.)

The Attorney General asserts defendant forfeited any objection to the trial court's reliance on the statements made during the sentencing hearing by failing to raise it in the trial court. We agree. In *People v. Roberts, supra,* 195 Cal.App.4th at page 1130, the Court of Appeal for the Sixth Appellate District held the defendant forfeited the argument that certain post-plea statements were inadmissible as not part of the entire record of the conviction by failing to object in the trial court. (See also Evid. Code, § 353, subd. (a).) Here, defendant raised only a nonspecific hearsay objection as to all of the prosecution's evidence. He did not argue post-conviction statements or admissions are inadmissible to prove the nature of the crime as they are outside the record of the conviction. His general hearsay objection did not preserve the specific ground raised on appeal. (Evid. Code, § 353, subd. (a); *People v. Abel* (2012) 53 Cal.4th 891, 924; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19-21; *People v. Lewis* (2001) 25 Cal.4th 610, 664.) Defendant's

general hearsay objection did not alert the trial court to the claim that the unsworn statements at the Nevada sentencing hearing were outside the record of the conviction under *Trujillo*.

Defendant argues as a matter of law, the trial court was allowed to consider only admissible evidence. Defendant relies on the following decisional authority: *People v. Trujillo, supra,* 40 Cal.4th at pages 170-171, 179-180; *People v. Roberts, supra,* 195 Cal.App.4th at pages 1124-1128; and *People v. Thoma, supra,* 150 Cal.App.4th at page 1100. None of these decisions stands for the proposition that no objection in the trial court was required.

Defendant forfeited any objection to the statements made at the Nevada sentencing hearing on grounds that evidence fell outside the record of the prior conviction. (Evid. Code, § 353, subd. (a); *People v. Abel, supra,* 53 Cal.4th at p. 924; *People v. Demetrulias, supra,* 39 Cal.4th at pp. 19-21; *People v. Lewis, supra,* 25 Cal.4th at p. 664.) Defendant chose to represent himself. Defendant was expressly advised by the trial court not to do so. The failure to properly object rests squarely with defendant and nobody else. Moreover, defendant concedes those statements, if they may be considered on appeal, constitute substantial evidence defendant personally stabbed Ms. McGowan within the meaning of sections 667, subdivisions (b) through (i), and 1170.12.

B. Presentence Custody And Conduct Credit

The trial court gave defendant credit for 695 days in presentence custody plus 347 days of conduct credit. However, defendant was in presentence custody from his arrest on November 8, 2010, until he was sentenced on October 3, 2012, a period of 696 days. Therefore, defendant is entitled to credit for 696 days in presentence custody plus 348 days of conduct credit. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469.)

C. The Abstract Of Judgment

The trial court imposed a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)), "plus the penalty assessment." The abstract of judgment does not reflect the penalties and surcharge. Therefore, the abstract of judgment must be amended to include: a $50 state penalty (§ 1464, subd. (a)(1)); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (§ 1465.7, subd. (a)); a $15 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $5 deoxyribonucleic penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $15 state-only deoxyribonucleic penalty (Gov. Code, § 76104.7, subd. (a), as amended eff. June 10, 2010); and a $10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)). (See *People v. Voit* (2011) 200 Cal.App.4th 1353, 1372-1373; *People v. Sharret* (2011) 191 Cal.App.4th 859, 863-864.)

IV. DISPOSITION

The judgment is modified to award defendant credit for 696 days in presentence custody plus 348 days of conduct credit. The judgment is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to amend the abstract of judgment to reflect the modified presentence custody credit. In addition, the abstract of judgment must be amended to reflect penalties and a surcharge on the $50 criminal laboratory analysis fee (Health & Saf. Code, § 1372.5, subd. (a)) as follows: a $50 state penalty (Pen. Code, § 1464, subd. (a)(1)); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (Pen. Code, § 1465.7, subd. (a)); a $15 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $5 deoxyribonucleic penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $15 state-only deoxyribonucleic penalty (Gov. Code, § 76104.7, subd. (a), as amended eff. June 10, 2010); and a $10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)). The clerk of the superior

court shall deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

MINK, J.*

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.